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Brief of Davock & Donnelly for P. in E.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Filed Feb. 27, 1899.

MORE G. SCRANTON,
Plaintiff in Error,

vs. No. 262.

EN S. WHEELER,
Defendant in Error.

In Error to the Supreme Court of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

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Counsel for Plaintiff in Error.

DETROIT:
Belford Printing Co., Steam Printing House, 11 and 13 Lafayette Ave.
1899.

SUPREME COURT OF THE UNITED STATES.

GILMORE G. SCRANTON,
Plaintiff in Error,

vs.

EBEN S. WHEELER,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This case was originally begun in the Circuit Court for the County of Chippewa, State of Michigan. It was removed to the United States Circuit Court for the Western District of Michigan, taken up on error to the Circuit Court of Appeals, and thence to the Supreme Court, where it was held that the suit had been improperly removed to the Federal Courts and remanded it to the Circuit Court for the County of Chippewa. The case was there tried and judgment entered for the defendant. On a writ of error the case was taken to the Supreme Court of the State of Michigan, where the judgment of the Circuit Court was affirmed. A writ of error to the Supreme Court of Michigan brings the case before this court.

The plaintiff filed his declaration in ejectment alleging that he was the owner in fee of an undivided one-half interest in a certain lot in the village of Sault Ste. Marie, and also that portion of the land beneath the water of St.

Mary's river, from the river bank on said lot to the thread of the stream, forming a part of said lot, and all riparian rights belonging and attached thereto and being a part thereof; that he was entitled to the possession thereof and that the defendant unlawfully withholds such possession from him. (Rec., p. 2-3.)

The defendant plead the general issue. (Rec., p. 1.)

Upon the trial the following facts, in brief, appeared from the evidence:

The plaintiff was the owner in fee of an undivided half of private claim No. 3, in the village of Sault Ste. Marie, Chippewa County, Michigan, according to the survey or plat of said village, made by Thomas Whelpley, pursuant to a certain act of Congress. (Rec., p. 4.)*

The land in question was confirmed under the provisions of that act to the heirs of Franklin Newcomb and one Peck jointly. (For deed from United States, see Exhibit "3," Rec., p. 27.) The act of Congress, entitled "An act providing for the examination and settlement of claims for land at the Sault Ste. Marie, in Michigan," in accordance with which the Whelpley survey was made, was approved September 26, 1850. The claim of Peck and Newcomb's heirs to the land in question was confirmed agreeably to the provisions of that act, September 4th, 1855. The plaintiff derived his title through mesne conveyances from the heirs of Newcomb. (Rec., p. 5.)

In 1852 the United States, by an act of Congress, granted to the State of Michigan the right to construct a ship canal around the falls of St. Mary's, including within such grant the donation of the right of way and certain

*A copy of said Whelpley survey was introduced and marked Exhibit Nine—line of new pier being since added. This exhibit, together with others marked Exhibits 1, 2, 4, 5, 7, 8, 9, 10, and A, are on file with the clerk of this court, having been returned together with the writ of error, from the Supreme Court of Michigan in accordance with an order of that court. (See p. 41, Rec.)

public lands for the purpose. Exhibit "2" (on file with the clerk of this court) is the plat of the survey of the proposed route of said canal, referred to in sections 1 and 6 of the act of Congress above mentioned. (Rec., p. 5.)

Under the authority granted to the State of Michigan, the canal was begun in 1853 and completed in 1855. As originally constructed the south pier of the canal extended across a portion of the front of plaintiff's lot, leaving, however, between his riparian lines as projected at right angles to the center of the stream, a gap of three or four hundred feet, through which access could be had from plaintiff's land to navigable water and vice versa. (Rec., p. 6.) The original south pier of the canal extended from the point where the canal emerged from the dry land, out through shallow water into deep water, extending across a portion of the front of plaintiff's lot, but "taking a turn to the northward into deep water." This pier as originally built remained until the change complained of was made, in 1877.

The rapids or falls in the St. Mary's river begin east of where plaintiff's easterly lateral line would strike deep water, if projected as plaintiff claims it should be; and the river proper in front of plaintiff's land and across his riparian front is naturally deep enough for navigation. Before the construction of the canal and in fact after the construction of the original pier and before the new one was built, deep water was always acessible from plaintiff's land and vice versa, without going beyond the lateral lines of plaintiff's lot, projected.

In 1877, in accordance with the recommendation of a corps of engineers made to the Secretary of War, and approved by him, the canal was partially reconstructed, extended and straightened, and a new pier built. Exhibit "A" (on file with the clerk) is a map of the proposed new

pier, showing its location, and conformably with which map the pier was constructed. (Rec., p. 6.)* In 1881 the new work was completed (Rec., p. 5) and in that year the State of Michigan transferred all its rights to the canal to the United States.

The effect of the construction of the new pier is to cut off entirely plaintiff's access from his land to navigable water, and vice versa, within its riparian lines as projected (see Exhibit "1"), and on both sides of the space between such projected lines of plaintiff's riparian property, and between the river bank and the pier, the water is only five feet deep. So that by the erection and maintenance of the pier in question the plaintiff is prevented from reaching water of any greater depth than five feet.

The plaintiff attempted to land a cargo on said pier, and thus convey it to his lot, but was prevented from doing so and driven off by the defendant, who claimed the exclusive right thereto for the United States. The defendant Wheeler was the superintendent of the canal, including the new south pier, employed by the United States and in possession of the same on behalf of the United States. He was in possession under such authority, and under such claim prior to and at the time of the commencement of this suit, and continued so up to the time of trial. (Rec., p. 5.)

The western extremity of the canal ended in two piers running out from the land into deep water, in a curve to the northward. The new south pier took a different direction, diverging from the northward curve of the old south pier at a point four hundred and fifty feet from the shore, and running in practically a straight line; direction, a little south of west. (Rec., p. 10.) This brought the western end of the new south pier one hundred feet nearer

*This new pier is marked on some of the exhibits "New South Pier."

shore than the corresponding point on the old south pier. The new pier, instead of running out to deep water as the old one did, was built in water which was naturally about five feet in depth. The new pier is about twelve hundred feet longer than the one which was originally built. The water lying between the line of the old pier and the line of the new one, was about five feet deep. (Rec., pp. 9, 10.) It was necessary to dredge this portion of the bed in order to make an artificial channel, and the pier as now built cuts off the plaintiff from all access to navigable water, as it crosses the riparian front of plaintiff's lot completely, and there is no way of reaching navigable water except by crossing the pier in question. (Rec., pp. 12, 16, 19.)

This is the substance of the testimony. The material facts were not in dispute and the errors assigned and relied on are the rulings of the court on matters of law. The learned Circuit Judge directed a verdict for the defendant on the ground that the action, if it resulted in a verdict in favor of the plaintiff, would necessarily result in a judgment against the United States, and it could not therefore be maintained.

In the Supreme Court the judgment was affirmed, the Court, however, holding that the Circuit Judge had arrived at the right result although by wrong reasoning. The decision in the Supreme Court was that the action was properly brought against the defendant individually and that a judgment against him would not be a judgment against the United States, and would stand; but that the plaintiff was not entitled to recover for the reason that the federal government had acted properly in appropriating the plaintiff's submerged land, and that, therefore, he was not entitled to compensation.

Plaintiff claims that although the federal government may appropriate his submerged land for a proper purpose without compensation, it cannot do so in this case,

because something further than the submerged land has been taken, i. e., his right of access to navigable water from the land, and to his land from navigable water. This, it is contended, is a valuable property right, inhereing in him as the owner of the upland or more correctly appertaining to the upland itself, forming a part thereof, and no more subservient to the right of Congress to appropriate property under the commerce clause of the constitution than is the upland itself. This plaintiff claims on the contrary that his right of access above referred to is a valuable property right and if taken for any purpose, it must be upon the payment of compensation. That by the judgment of the Circuit Court, as affirmed by the Supreme Court, he is deprived of his property in violation of the guaranties contained in article 5 of the amendments to the Constitution of the United States.

ASSIGNMENT OF ERRORS.

The first two assignments of error are alike in that they object generally to the affirmance of the judgment of the Circuit Court. (Rec., p. 37.)

The third assignment of error is that the Supreme Court erred in deciding that the federal government was lawfully in possession of the lands in controversy by virtue of its power to improve the navigability of rivers and streams and in holding that the federal government had the lawful right to take possession of the submerged lands of the plaintiff in error without making compensation therefor, and to keep and use the same for the improvement of the river and the extension of the canal around the river without giving plaintiff in error due compensation.

The 4th assignment of error complains that the Supreme Court erred in holding that plaintiff was not being

deprived of his property under the 5th amendment to the federal Constitution.

The 5th assignment of error is as follows: The said Supreme Court of the State of Michigan, erred in affirming and approving the action of the Circuit Court for the County of Chippewa in refusing to charge the jury, as requested by the said plaintiff in error, as follows:

"That under the law of this State applicable to the facts in this case the plaintiff is the owner of the submerged land in front of his upland, bounded by lines extending from the lateral lines of his upland to the center file of the stream and running at right angles with the course of the stream in front of the upland, and I therefore charge you that the land and property described in plaintiff's declaration belongs to and is owned by the plaintiff in fee-simple as claimed by him and so belonged to him when this action was brought.

That the pier or structure in question as shown by the testimony was constructed and is now maintained by the defendant across the plaintiff's land without his consent and against his rights in the premises.

That neither the defendant nor the United States had any lawful right to construct said pier on and across the premises in question, thus taking possession of the premises adversely to the plaintiff and excluding the plaintiff from enjoyment thereof and from all access from his said land and premises to the navigable water of the river in front thereof and from the navigable water of the said river to his land.

That neither the Government of the United States nor the defendant had any lawful right to so construct said pier or to maintain the same as was being done at the time this suit was brought and as they are now doing without their first having acquired the right to so construct and maintain the same from the owner of the fee or of having

obtained the right thereof by proceedings under the power of eminent domain on payment of due compensation to the owner of the land therefor.

That under article V of amendments to the Constitution of the United States the property of the plaintiff, the property in question being the private property of the plaintiff, could not be lawfully taken for the public use to which it was appropriated without just compensation having been made therefor to the owner or without due process of law.

And the jury are instructed that the construction of this pier was in violation of said article V of the amendments to the Constitution of the United States in this, that it appears from the testimony in the case that the same was appropriated without due process of law, and the same was taken and devoted to a public use without the consent of the owner thereof and without just compensation therefor, and that the taking possession of the land of the plaintiff, as appears by the record, was in violation of said article V, and that the taking possession of the land of the plaintiff and the construction of the pier thereon in the manner shown in this case, the effect of which was to deprive him of all egress from his said land to the navigable stream, and to prevent him using his said property by passing over or across said pier, as shown in the testimony of the case, was in violation of said article V of amendments to the Constitution of the United States and as depriving the owner thereof of his property without due process of law and without just compensation and without his consent."

The 6th assignment of error sets up that the Supreme Court erred in affirming the action of the Circuit Court in its refusal to direct a verdict for plaintiff in error and in directing a verdict for defendant in error.

ARGUMENT.

The main question presented here is whether Congress under the exercise of its power to regulate commerce, can entirely cut off the access of a riparian proprietor from his land to the water and from the water to his land. There is no doubt that Congress, in the exercise of this power, may appropriate submerged land, and the shore.*

It has been held in numerous cases that navigable waters and the soil beneath them are under the control of the Federal Government, for the purpose of improving and regulating commerce and navigation. Our theory of the present case is not inconsistent with that doctrine, and to avoid misapprehension we will state at this point that we concede that to be the law. It is not claimed here that compensation must be made for the appropriation of submerged lands, but that Congress has no power to cut off the plaintiff from his access to and from the navigable water in front of his land without compensation. We contend that the right of access of a riparian owner is a property right which cannot be destroyed nor appropriated by Congress under the commerce clause of the Federal Constitution, except in accordance with the provisions of the 5th Amendment.

There are many cases where damages have been sought by the owners of submerged lands because of the appropriation thereof, but without avail. There are many other cases where litigants have conceived themselves aggrieved by the appropriation of submerged lands not their own,

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*By "shore" is meant the land between high and low water mark.

Hale's, De Jure Maris.
Shively vs. Bowlby, 152 U. S., 1.

The charge of the Circuit Court to the jury is set forth at large on pages 21 to 26 of the record. The opinion of the Supreme Court appears on pages 33 and 34 of the record.

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but because of their ownership of riparian property in the vicinity, higher up or lower down the stream, they have suffered loss. In both of these cases damages have been uniformly denied, though on different grounds.

When the submerged land is taken, no compensation need be paid; not, however, on the ground that it is not property, nor on the ground that it has no value; but for the reason that the private owner has only a qualified title to it. His title is subject to the right of Congress to appropriate it. Congress, therefore, does not deprive the owner of his property, because the land for this purpose is not his. Congress, on the other hand, simply takes what it already owns, and not what belongs to someone else. Again, when Congress places an obstruction in a stream for the improvement of commerce, such as a pier, or a light-house, some persons owning adjacent property forming the banks, may be inconvenienced or sustain positive loss from the fact that their right to pass up and down the stream is impaired. They may be obliged to take a longer route and pass around the obstruction. This is an injury to the right to navigate the stream. But the person whose right of navigation is impaired cannot recover, because whatever injury he suffers, he sustains in common with every other member of the traveling public. And although he may suffer in a greater degree, or although his injury may be attended with particular damages, he cannot recover, because the injury is to a right which he has, merely as a member of society. He is deprived only of the privilege of participating in the public right of navigation, *jus publicum*. This right, to pass and repass along the public highway, is not dependent upon the ownership of any riparian property, nor is it any greater by virtue of such ownership. The right is one which inheres in him as an individual, whether he owns the bank or not; and although if he

chances to own such property in the immediate neighborhood of the obstruction, he may suffer in a greater degree, nevertheless, as already pointed out, his injury is to the public right of navigation and is something which he sustains in common with all others.

Most of the cases which have come up in this court are cases where recovery has been sought for an impairment of this right, and damages have uniformly been denied.

The true ground for refusing recovery where damages are claimed for this class of injuries is that suggested above, and upon this ground this court has repeatedly based its decisions. It is obvious from this that the mere fact that a private individual chances to own riparian property near to the obstruction, would not change the character of the injury, nor place him in any better position for the recovery of damages, than an individual who owned no property at all. The injury consists in interfering with the right to pass or repass along the stream, and this is obviously the same whether a given individual is also a riparian owner or not.

Although Congress has an undoubted right to appropiate the bed of the steam under the power to regulate commerce, we have seen no claim anywhere advanced that the land abutting upon navigable waters is itself subject to the right of Congress to control navigation in the sense that it may be appropriated by the Federal Government, without compensation first being paid therefor. On the contrary, we think it cannot be seriously disputed that the upland cannot be appropriated under the commerce clause of the Constitution, without compensation being paid to the owner.

If the upland itself cannot be appropriated, it would seem clear that whatever is or constitutes a part of that land, or the enjoyment thereof, cannot be appropriated.

Otherwise, the statement that the land is not subject to appropriation would mean little or nothing. The vital question appears to be, is the right of access, which is appurtenant to the upland, such a part thereof, that it cannot be appropriated or destroyed, or, in the words of the Constitution, "taken," without compensation? Is the right of ingress to and egress from riparian property a thing of value? If it is, there would appear to be no question but that it could not be destroyed, nor its owner deprived of it without compensation.

In Gould on Waters, 2nd Ed., Sec. 151, the author says: "When it is conceded that riparian rights are property, the question as to the right to take them away without compensation would appear to be at an end."

Starting with the familiar proposition that private property cannot be taken for public purposes without just compensation, it will be our purpose to show: first, that the right of access is property and a thing of value; second, that it constitutes a part of the land; and third, that being a part of the land it is no more subservient to the right of Congress to appropriate property, under its power to regulate commerce, than is the land itself. It being once granted that it is property, and a thing of value in the eye of the law, and an integral part of the upland, its appropriation could no more be justified on the ground that it was a result incident to the exercise of the right of the Federal Government to occupy the bed of the stream, than the appropriation of the land itself. The significance of this will appear presently.

This right of access, it is important to note, is quite distinct from any right which the owner of the upland may possess, in common with the rest of the public, to navigate the stream, and is entirely independent of and distinct from the ownership of the submerged land. It is a right which is pertinent to the upland; it is necessary

to its enjoyment, and passes with the land as the latter passes from one owner to another. It is not an easement in gross, inhering in a private individual, as such, but inheres in the land itself.

Riparian rights are such as follow or are connected with the banks of streams and rivers. The mere etymology of the word indicates that the term applies to those rights which are connected with the bank or the upland. These rights are distinct from rights growing out of ownership of the bed of the stream, and depend upon the ownership of the land contiguous to the water, being the same whether the proprietor of such land owns the soil under the water or not.

Gould on Waters, 2nd Ed., Sec. 148.
Jones vs. Johnston, 18 How., 150.
Johnston vs. Black, 209.
Bates vs. Ill. Central Ry. Co., 1 Black, 204.

Included within these so-called "riparian rights" is the right of access, which is the right of the owner of the land to pass from his land upon the water and *vice versa*. This right of access exists by virtue and in respect of his riparian property. The riparian owner has the right to the water frontage, belonging by nature to his land, although the only advantage of it may consist in the access thereby offered him to the water, for the purpose of using the right of navigation. This right of access is a private right, wholly distinct from the right of its owner to use the stream for purposes of navigation in common with the rest of the public. "It is distinct from the public right of navigation, and an interruption of it is an encroachment upon a private right, whether caused by a public nuisance or authorized by the Legislature."

Gould on Waters, 2nd Ed., 149, p. 304.

The English courts have repeatedly recognized this distinction and the cases disclose a consistent adherence to it.

In Rose vs. Groves, 5 M. & G., 613, where an inn-keeper recovered damages against the defendant for wrongfully preventing the access of guests to his house upon the river Thames by placing timbers in the river opposite the inn, Tindall, C. J., said: "This is not an action for obstructing the river, but for obstructing the access to the plaintiff's house on the river."

Attorney-General vs. Conservators of the River Thames, 1 Hemming & Miller, 1, points out the distinction, in discussing the question of the extent to which the Government may authorize interference with the rights of a riparian owner for the purpose of improving the navigability of a stream. The Court says:

"Now I apprehend that *the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway or the river.*"

In Lyon vs. Fishmongers' Co., 1 App., Cases 662, 10 Ch., 629, Lord Cairns, speaking of Rose vs. Groves, said:

"As I understand the judgment in that case, it went not upon the ground of public nuisance, accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff had been interfered with. The plaintiff, an inn-keeper, on the banks of a navigable river, complained that the access of the public to his house was obstructed by timber which the defendant had placed in the river; and it would be the height of absurdity to say that a private right was not interfered with, when a man who has been accustomed to enter his house from a highway finds his doorway made impassable, so that he no longer had access to his house from the public highway. This would equally be a private in-

jury to him whether the right of the public to pass and repass along the highway were or were not at the same time interfered with. In Rose vs. Groves, Chief Justice Tindall put the case distinctly upon the footing of an infringement of a private right. He says: 'A private right is set up on the part of the plaintiff, and to that he complains that an injury has been done;' and then, after stating the facts, adds, 'It appears to me, therefore, that the plaintiff is not complaining of any public injury.'

Independently of the authorities, it appears to me quite clear, that the right of a man to step from his own land onto a highway, is something quite different from the public right of using the highway."

"Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank, nor is it a right which *per se* he enjoys in a manner different from any other member of the public. *But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character.* It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place, and it becomes a form of enjoyment of the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction. **It is, as was decided by this House in the cases to which I have referred, a portion of the valuable enjoyment of the land, and any work which takes it away is held to be 'an injurious affecting of the land,' that is to say, the occasioning to the land of an *injuria* or an infringement of right.** The taking away of river frontage, interrupting the access between the wharf and the river, may be an injury to the public right of navigation; but it is not the less an injury

to the owner of the wharf, which, in the absence of parliamentary authority, would be compensated by damages or altogether prevented."

In referring to the case of the Attorney-General vs. Conservators of the Thames, 1 H. & M., 6, Lord Cairns says, speaking of a direct interference with the access to a wharf: "Now I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway on the river."

The late Lord Wensleydale observed in this house in the case of *Chasemore vs. Richards:* "The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface *ex jure naturae* belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbor's soil for his own in its natural state. His right in no way depends upon prescription or the presumed grant of his neighbor.

"My Lords, I cannot entertain any doubt that the riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights as an ordinary riparian owner underlying and controlled by, but not extinguished by the public right of navigation."

The question was also considered in *Metropolitan Board of Works vs. McArthur*, 7 House of Lords Law Reports, 243.

"According to these decisions," says Gould, § 124, "which do not differ in principle from Brayton vs. Fall River, and Haskell vs. New Bedford, it is the right of access to and from the highway, and not the right of access by means of the highway, which is regarded as a private right." *The distinction, in other words, is between the right of immediate access from a man's property to a highway and vice versa, and the power to complain of a mere obstruction to his progress in the highway after he gets there.*

Caledonia Ry. Co. vs. Ogilvy, 2nd Macq. Sc. App., 229.
Montreal vs. Drummond, 1 App. Cas., 384.
Bell vs. Quebec, 5 App. Cas., 8497; 2 L. R., 305.

There is a clear distinction between the case where an obstruction placed in a river impairs the navigation of the stream and incidentally makes the access to the adjacent owner's land more difficult, and a case where the obstruction is placed across the front of the land wholly cutting off ingress and egress. As was said in Attorney-General vs. Conservators of the River Thames, supra, "in truth the access is not blocked up; the wharf will not be as easily approached, and perhaps not at all by the same route, but that is a mere interruption to the navigation on the river, which they enjoy in common with the public, and not as part of their special right of access."

The distinction is clearly brought out in the case of Rose vs. Groves, 5 M. and G., 613 (where an inn-keeper recovered damages against the defendant for wrongfully preventing the access of guests to his house, upon the River Thames, by placing timbers in the river opposite the inn). The Court said: "This is not an action for obstruct-

ing the river, but for obstructing the access to the plaintiff's house on the river."

The same distinction has been recognized in this country. In Gould on Waters, 2nd Ed., page 245, the author says: "Whenever the obstruction immediately adjoins, or is against the front of the plaintiff's premises, it is as to him, a private nuisance for which an action will lie, or which may be restrained by injunction. But when it is at a distance from the plaintiff's land, and the only injury which he sustains consists of inconvenience, or loss of access thereto, without direct and clearly defined damage, other than the general depreciation of property, common in a greater or less degree to all the riparian owners similarly situated, and preventable by an abatement of the nuisance, the plaintiff cannot maintain an action." And in Section 124: "An obstruction in front of one's own premises may prevent his entering upon the highway, and thus interfere with a peculiar right. But when he is once upon the highway he is a traveler like the rest of the public, and though an obstruction at a distance may as effectually prevent ingress and egress as when it is opposite his door, yet the right to pass along the way is one which he shares in common with the general public. Injuries to riparian owners arising from obstructions to the navigation may thus differ from those sustained by members of the public who are simply prevented from exercising the common right of passage upon the water."

For full collation of cases see Gould, Sections 124, 148, et seq.

The right of access from riparian property to the water and *vice versa* has been held to be valuable property, which cannot be destroyed or impaired without compensation.

In Yates vs. Milwaukee, 10 Wall., 497, a municipal corporation which was authorized by the legislature to es-

tablish dock and wharf lines upon rivers within its limits, and to restrain and prevent encroachments upon the rivers and obstructions thereto, declared by ordinance that the plaintiff's wharf was a nuisance to navigation and ordered it abated.

Miller, J., said with reference to lots adjoining navigable rivers, "whether the title to the owner of such a lot extended beyond dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see fit to impose for the protection of the rights of the public. * * * This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaireed. It is a right of which when vested the owner can only be deprived in accordance with the established law; and if necessary that it be taken for the public good, upon due compensation."

See also
Webber vs. Harbor Commis'rs, 18 Wall., p. 57.
Richardson vs. Boston, 24 Howard, 188.
Van Dolsen vs. New York, Blatch., 454.
Gould on Waters, 2nd Ed., p. 305, Note 4, and cases cited.

This holding has been recognized and approved by this court in several cases. In the case of Ill. Central Ry. Co. vs. Ill., 146 U. S., 387, that part of the decision in Yates vs. Milwaukee, wherein the right of access is said to be a valuable property right, which cannot be taken without compensation, is cited approvingly. In Webber vs. Harbor Commissioners, 18 Wall., page 64, Mr. Justice Field

said: "It is unnecessary for the decision of this case to question the doctrine that a riparian proprietor whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream, as part of his land, and to construct a wharf or pier, bridging into the stream for his own use, and the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public, as was held in Yates vs. Milwaukee. On the contrary, we recognize the correctness of the doctrine as affirmed in that case."

In Potomac Steamboat Co. vs. The Upper Potomac Steamboat Co., this Court, in the course of its opinion, quotes from Yates vs. Milwaukee, 10th Wall., 497, approvingly, recognizing the authority of that case, so far as it holds that among the rights of the owner of land bounded by a navigable stream, is "access to the navigable part of the river from the front of his lot, etc." The Court also cites in that opinion, Keyport Case, 3 C. E. Green, 516, which defines the riparian right as "a right placed in the riparian owner, to preserve and improve the connection of his property, with the navigable water." The Court quotes approvingly the language of Lord Cairns, in Lyon vs. Fishmongers Co., Cases, 662-672, supra.

From the foregoing cases it appears that in England the distinction between the rights in land beneath navigable water and the right to pass and repass upon such water on the one hand, and the right of access from riparian property to such water on the other, is clearly recognized. The same distinction has been recognized in this country. The case of Yates vs. Milwaukee, 10 Wall., 497, has already been referred to. This case arose over an attempt to prevent the owner of the riparian front from maintaining a dock and extending it out to the navigable water in front thereof, and the Court discussing the question, says:

"But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are accesses to the navigable part of the river from the front of his lot, the right to make a landing wharf, or pier, for his own use, or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. This proposition has been decided by this Court in the cases of Dutton vs. Strong, 1 Black, 23 (66 U. S. XVII., 29), and R. R. Co. vs. Schurmeier, just cited. The Supreme Court of Wisconsin has gone further and asserts the doctrine that the title of the owner of such a lot extends to the center of the stream, subject to the easement of the public in its use for navigation, and that he may construct docks or landing places for goods or passengers, taking care that vessels employed in navigating the stream are not impeded in their passage nor prevented from the use of all parts of the stream which are navigable. (Walker vs. Shepardson, 4 Wis., 486.) This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which when once vested the owner can only be deprived in accordance with established law, and, if necessary, that it be taken for the public good, upon due compensation."

We have suggested elsewhere that a person who sustains loss from an obstruction placed in navigable water, but not cutting off his right of access thereto cannot recover because the injury is to the public right of navigation and is an injury which he suffers in common with the rest of the public using the highway, although perhaps in a greater degree. A person, on the other hand, who loses

his right of access not only suffers a loss in common with the rest of the public, but something in addition to that. The reason for denying recovery in the first case would not apply to the latter. This distinction was recognized in the English cases, supra, notably in Lyon vs. Fishmongers. The Supreme Court of Wisconsin also recognizes the distinction in a number of cases, Delaplaine vs. the C. & N. W. Ry. Co., 42 Wis., 214, among others. In that case the plaintiffs owned lots abutting on a navigable lake, and the defendant, without their consent, constructed its railway within the water, but so near the front of their lots as to cut off their access to the body of the lake, leaving along such front a pool of stagnant water. The plaintiff owned only to the water's edge. The Court said:

"But while the riparian proprietor only takes to the water line, it by no means follows, nor are we willing to admit, that he can be deprived of his riparian rights without compensation. As proprietor of the adjoining land, and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land out to navigable waters in aid of navigation, not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses, distinct from the rest of the public. * * * It is evident from the nature of the case, that these rights of user and of exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems unnecessary to add the remark *that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water.* In other words, according to the uniform doctrine of the best authority, the foundation of riparian rights, *ex ri ter-*

mini, is the ownership of the bank or shore." (Italics ours.)

The case of Lyon vs. Fishmongers is discussed, its reasoning approved and its authority recognized. The case does not discuss the question whether recovery could be had in case the legislature attempted to authorize the building of the tracks and to relieve it from liability. But the decision does recognize that the right of access is a valuable property right, a constituent element of the land, and that in its loss the owner sustains an injury in addition to the injury suffered by him as a member of the public at large.

The Court continues: "These riparian rights are undoubted elements in the value of the property thus situated. If destroyed can anyone seriously claim that the plaintiffs have not suffered a special damage in respect to their property, *different both in degree and kind* from that sustained by the general public? It seems to us not."

In Brisbane vs. St. Paul, etc., Ry. Co., 23 Minn., 114, it was held that the state could not give a railroad company the right to occupy a riparian front without making compensation for the injury to riparian rights. On page 130, the opinion is as follows, after citing Dutton vs. Strong, 1 Black, 23; Railroad Co. vs. Schurmeier, 7 Wall., 272, and Yates vs. Milwaukee, 10 Wall., 497: "According to the doctrine of these decisions the plaintiff possessed the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain, for his own and the public use, suitable landing places, wharves, etc. * * * The rights which thus belonged to him as riparian owner of the abutting premises, were valuable property rights, of which he could not be divested without consent, except by due process of law, and, if for public purposes, upon just compensation."

This case has been followed in Carli vs. Stillwater Ry. Co., 28 Minn., 373. On page 380, the opinion reads: "It is claimed that the plaintiff title did not extend to lands covered by the waters of the lake * * *, and such is the law. But it is well settled that the owner of land bounded by a navigable stream has certain riparian rights which spring from the ownership of the bank." * * * Brisbane vs. Ry. Co., supra, is then cited, the portion quoted by us inserted at length. The opinion continues:

"In addition to the authorities cited in the opinion in this case, the doctrine has the authority of a recent English case in the house of lords, and we are satisfied that it rests upon solid grounds of justice and utility. Lyon vs. Fishmonger's Company, L. R., 1 App. Cas., 662."

Monongahela Nav. Co. vs. U. S., 148 U. S., 312, was a case where under the authority of a Pennsylvania legislature the Monongahela Navigation Company had constructed certain locks and dams. "It cannot be doubted," said Mr. Justice Brewer, " * * * that Congress has the power in its discretion to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the use of promoting its navigability. In other words, it is within the competency of Congress to make such provision respecting the improvement of the Monongahela river as in its judgment the public interests demand. Its dominion is supreme.

But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among others that of the Fifth Amendment. * * * The power to regulate commerce is not given in any broader terms than that to establish post-offices and post-roads; but, if Congress wishes to take private property upon which to build a post-office, it must either agree

upon the price with the owner, or in condemnation pay just compensation therefor. * * * If a man's house must be taken that must be paid for; and if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, *because it is a substantial element in the value of the property taken.*"

If this holding is sound, that where *a substantial element in the value of a man's property* is taken, it must be paid for, we fail to see why the taking of a riparian owner's right of access (which, under Yates vs. Milwaukee, Brisbane vs. Ry. Co., Carli vs. Stillwater, Delaplaine vs. C. & N. W. Ry. Co., etc., etc., is a valuable property right and obviously a substantial element in the value of the upland) does not entitle the owner to compensation. The only distinction which occurs to us between the Monongahela case and the case at bar is that in the latter the owner is deprived of an intangible right apart from the appropriation of his land; while in the former the owner was deprived of both. This distinction does not appear to us to be sound. The owner of land may be damaged without taking his land. For example, he is entitled to have his land remain in its natural position; and if an adjacent owner excavates at the dividing line, causing the land to cave in, he is liable in damages. The right to have one's land supported in its natural condition is a valuable right and when abridged, redress can be had.

So also is the right of access to one's lot from navigable water a valuable right; and while Congress may appropriate the submerged land for a proper purpose, it must do so without destroying or abridging the private rights of the adjoining proprietor. In other words, as is said by Gould, in the work to which we have had occasion to refer before, when it is conceded that riparian rights, including the right of access, are property, the question of the right

to take them without compensation would seem to be at an end.

The question of the power of the State to authorize works which impair riparian rights, under its right to control commerce and navigation, so long as that sphere of legislative control is not entered by the Federal Government, is the same question involved here. It was early decided by this court that this power was derived from the respective States and that therefore the Federal Government has no other or greater power in this respect than the States themselves had, or still have so long as Congress does not exercise the power thus ceded to it by the States.

This being the case, the States and the United States in the exercise of this power, are subject to the same limitations.

In Pollard's Lessee vs. Hagan, 3 How., 219, it was held that the United States has not the title to the land beneath navigable waters, but that this is in the respective Sates. That under the constitution the power to control the same, for purposes of commerce and navigation, was ceded by the original States to the general government; and that the new States admitted to the Union stand in all respects on an equal footing with the old. The general government has merely the right to exercise this power when it chooses; and in the exercise thereof, it has no greater rights than belonged to the States themselves. Not only this, but until the general government exercises this power, the States may still do so. It becomes apparent from this that whatever limitations have been placed upon this power by the courts when it has been exercised by the States, would also be imposed upon that power when exercised by the United States.

South Carolina vs. Georgia, 93 U. S., 4.

We have already cited some cases where it has been held that the State cannot deprive the riparian owner of his right of access. There are many others which space will not permit us to insert here. We refer the court to Gould vs. Waters, 2d Ed., secs. 123-124, for a full collection of authorities. The distinction must be kept in mind between injuries to riparian rights which are private in their nature and injuries to the right of navigation, which is public. We have already discussed this question at some length. Gould says, sec. 123: "Whenever the obstruction immediately adjoins or is against the front of the plaintiff's premises, it is as to him a private nuisance for which an action will lie, or which may be restrained by injunction." And in sec. 124: "An obstruction in front of ones own premises may prevent his entering upon the highway and thus interfere with a peculiar right. But when he is once upon the highway he is a traveler like the rest of the public, and though an obstruction at a distance may as effectually prevent ingress and egress as when it is opposite his door, yet the right to pass and repass along the way is one which he shares in common with the rest of the public."

An examination of some of the cases decided by this Court, in which damages have been denied for injuries resulting from obstructions placed in streams under congressional authority, discloses that the loss resulted from an injury to the right of passage upon the highway after the riparian owner gets upon it and not from the exclusion of the owner from access to the water from his lot and vice versa.

Gibson vs. U. S., 166 U. S., 69, was a case where the plaintiff owned a farm upon an island in the Ohio river, having a water frontage of 1,000 feet. Upon this front she had constructed a landing from which she was accustomed to ship produce by way of the river. Congress

authorized the construction of a dike in the river for the concentration of the water into a certain channel and plaintiff's landing was thereby rendered less accessible. The court of claims made certain findings upon which the decision was based, and among others the following:

"VII. Claimant's access to the navigable portion of the stream was not entirely cut off; at a 9-foot stage of the water, which frequently occurs during November, December, March, April and May, she could get into her dock in any manner; that from a 3-foot stage she could communicate with the navigable channel through the chute; that at any time she could haul out to the channel by wagon."

From this it appears that plaintiff's right of access to navigable water was not destroyed but, at the most, rendered more difficult. It was always possible for her to reach navigable water and although her premises were rendered less valuable by reason of the inconvenience, nevertheless the connection between her land and the water was not destroyed. The situation in this case is analogous to the situation in the present case prior to the construction of the new south pier. The old pier extended across a portion of plaintiff's farm, but there was always a gap of some 300 feet through which access to navigable water could be had. (See, Statement of Case Supra.) The present pier cuts off access entirely, and the plaintiff is even prohibited from crossing the pier to communicate with his land. The decision in the Gibson case must be taken in connection with the facts of that case; and although the opinion states broadly that riparian rights are subject to the paramount right of Congress to appropriate them under the commerce clause, nevertheless, all that was actually decided was, that those rights which the riparian proprietor has in the bed of the stream by virtue of his ownership of the upland are subject to appropria-

tion by Congress, and that any damage suffered by the riparian owner as a result of the appropriation of his submerged land by which he is inconvenienced in navigating the stream after he gets upon it, whether that navigation be for the purpose of reaching his own land or otherwise, is an injury suffered by him in common with the rest of the public.

An examination of the cases cited in Gibson vs. United States, and upon which that decision is based, discloses that the holding is grounded upon this last mentioned doctrine.

In the Gibson case, the Court cites Eldridge vs. Trezevant, 160 U. S., 452. In that case it was held that where the State of Louisiana directed a levee to be built upon and across the land of a riparian owner, such owner was not deprived of his property without compensation, in contravention of constitutional guaranties. This holding, it is important to note, proceeded upon this theory, that the riparian property was, and had been prior to the admission of the State of Louisiana to the Union, subject to a servitude in favor of the public, making it liable to appropriation for the purpose of protecting the surrounding country from inundation. In that case, Bass vs. State, 34 La. Ann., 494, is cited, in which a similar right in the State was justified under the police power. The case of Eldridge vs. Trezevant, proceeded, therefore, upon a doctrine peculiar to the State of Louisiana, which justified the taking of riparian property without compensation to secure the public safety. This is in effect invoking the doctrine of the police power. There is nothing in that decision to indicate that this Court would have held similarly on that state of facts, in a jurisdiction where that peculiar doctrine did not obtain.

The case of Gibson vs. U. S. is in harmony with Yates vs. Milwaukee. The case proceeded not upon the theory

that the right of access was not valuable property, but upon the well-known doctrine that any incidental damage resulting from an obstruction placed in navigable waters by Congress, for the improvement of commerce, could not be recovered for, where the damage was suffered by an individual in common with the rest of the public, although in a greater degree..

In none of the cases cited in Gibson vs. U. S. do we find that it denied that the right of access is a valuable property right, nor is it anywhere asserted that it is any more liable to appropriation without compensation, than the upland itself, of which it forms a part.

In Shively vs. Bowlby, for example, the familiar doctrine was announced that the submerged land was subservient to the paramount right of Congress. That case went no further. There is nothing in that case inconsistent with our contention that the right of access belonging to the upland, and which inheres in the owner thereof irrespective of whether he has also the title to the submerged land, is a valuable property right.

The decision in Gibson vs. U. S. is based also upon the doctrine that the occupancy by Congress, of the bed of a stream being lawful, any incidental damage suffered by riparian proprietors is *damnum absque injuria*. While the decision in that case did not require any other doctrine to be invoked, than the one already stated, i. e., that the injury to Mrs. Gibson was simply to her right to participate in the *jus publicum* of navigating the stream, and was therefore only such as she sustained in common with other members of the traveling public, although in a greater degree, still it cannot be said in any case that the appropriation of private property could be justified on the ground that it was merely incidental or necessary to the exercise of a lawful governmental power. Certainly if the upland itself were taken, Mr. Scranton could re-

cover, and the fact that his damage was merely incidental to the exercise of a proper governmental function would make no difference. If that function cannot be exercised without taking private property, then that private property must be paid for. Likewise, if the right of access is a valuable property right, forming a part of the upland, or, as was said in Monongahela Nav. Co. vs. U. S., supra, "a substantial element in the value of the land," and this and other Courts have said that it is, then that cannot be taken without compensation.

In the case of Priewe vs. Wisconsin State Land Company, 33 L. R. A., 650, it was said:

"In this State it has been repeatedly held that the riparian proprietor upon navigable lakes or ponds takes the land only to the water's edge, but, that, as such proprietor, he has the exclusive right of access to and from the lake in front of his land, * * * * that such rights grow out of his title to the land, and have a pecuniary value, and their destruction or material abridgement is generally an injury, entitling him to redress." (Citing cases.)

In North Shore Ry. Co. vs. Pion, 14 App. Cas., 612, 620, affirming the judgment in same case entered by Supreme Court of Canada, 14 Can. Sup. Ct., 677, it was held that a riparian owner on a navigable river is entitled to damages against a railway company, although no land is taken from him, for the obstruction of his access between his property and navigable water, caused by the construction of a railway. The decision in the Supreme Court of Canada reads: "In the present case, * * * * the substance of the plaintiffs' claim in their action is that the defendants have illegally constructed a work on the navigable waters of the River St. Charles in front of their property which cuts off all access between their property and the navigable waters of the river. If this allegation

be true the cases conclusively decide that the charge involves an infringement of a right of privilege incident to the land, which is an actionable wrong."

Cooley, in his "Constitutional Limitations," 6th Ed., p. 666, says:

"Any proper exercise of the powers of government, which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation, or give him a right of action." Assuming this to be a correct statement of the law it follows that an individual is entitled to compensation when (1) his property is directly encroached upon, or when (2) he is disturbed in his possession, or (3) his enjoyment of the same.

This reference is supported by the language of the same author on page 670 of the same work:

"On the other hand, any injury to the property of an individual which deprives the owner of the ordinary use of it, is equivalent to a taking, and entitles him to compensation."

It will not be necessary to recall the authorities which in our opinion establish beyond question that the right of access is an incident to the land and its exercise a form of the enjoyment thereof. Nor do we think it can be seriously disputed that the plaintiff in error has been disturbed in the possession and enjoyment of his land, when he is absolutely cut off from going upon it from the water and from going from it upon the water. So far as anything in the record is concerned this may be his only means of ingress and egress. We think it can hardly be said that he is not entitled to recover on the ground that his loss is only such as is sustained by him as a member of the traveling public.

The case of Transportation Co. vs. Chicago, 99 U. S., 635, goes farther than any we have found, towards hold-

ing that the destruction of the right of access is *damnum absque injuria*. It is to be noted in connection with that case, however, that the interruption of access was only temporary, while in the case at bar it is permanent. Whatever may have been the extent of that holding in that case, we have no hesitation in saying that if it was intended to lay down the rule that an individual can be shut up in his lot with no means of access to the highway without compensation, the case cannot, in our opinion, be justified on authority, nor upon principles of ordinary justice.

The obviousness of this must appear, when it is once conceded that the right of access is a valuable property right, a *jus privatum* as distinguished from a *jus publicum*, and that it constitutes a means of enjoying the land. If this is granted, the right of access is a part of the land, and its destruction could no more be justified on the ground that it is only incidental to the prosecution of a lawful work, than could the taking of the land itself.

The courts of New York have come finally to recognize that this right of access cannot be cut off without compensation by a work done under the authority of the State Legislature.

> Williams vs. New York, 105 N. Y., 419, 436.
> Kane vs. N. Y. Elevated Ry., 125 N. Y., 164, 184.
> Rumsey vs. N. Y. & N. E. Ry., 133 N. Y., 79 and 136 N. Y., 543.

We have gone into this subject somewhat extensively because we feel that it is a subject of considerable importance, not only to the plaintiff in error, but to the public generally. To summarize: We contend that the right of access is a valuable property right; that it is a part of the upland; that it inheres in the owner regardless of whether he also owns the submerged land; that it is a private right distinct from the right to navigate the

stream after the owner is upon the stream; that although a riparian owner cannot have redress for an obstruction which does not cut off his right of access, because his injury is to the jus publicum, and is something which he suffers in common with the rest of the public, still he cannot be deprived of his right to pass from his land onto the water and vice versa, without first being paid just compensation.

"And though it is easy to suggest metaphysical difficulties, when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other," says Lord Cairns, "this does not alter the character of the right."

The proposition that the plaintiff in error can be cut off entirely from reaching deep water by boat, and prohibited from crossing the pier which shuts him in, does not commend itself to the conscience when tested by the ordinary principle of natural justice, of which, we assume, the fifth amendment was but the formal legal expression.

There is another question on this case which was decided favorably to the plaintiff in error, by the Supreme Court of Michigan, and which we will not go into at any great length. It concerns the right to maintain this action against this defendant. It was held by the Circuit Judge in the Chippewa Circuit Court, that this action could not be maintained because a judgment against this defendant would be in effect a judgment directly against the United States. Both the Supreme Court of Michigan and the Circuit Court of Appeals for the Sixth Circuit,

held otherwise, and we feel confident that a brief reference to the opinion in the latter case will suffice to convince this Court of the correctness of that holding. (See Scranton vs. Wheeler, 6 C. C. A., 585.)

That part of the opinion bearing upon the question we will insert here.

"Except where Congress has provided the United States cannot be sued. This proposition is axiomatic. But the doctrine has no application to officers and agents of the United States, who while in possession are sued in ejectment by one claiming the title and right of possession. When such officer and agent is sued and he undertakes to justify and defend his possession by setting up and relying upon the title and right of the United States, a judicial question is presented, and the court may inquire into such title, and determine whether it is the superior right and title, and render judgment as the right may appear. This has been the well-settled practice and rule of the United States Court, and in the well-considered case of United States vs. Lee, reported in 106 U. S., 196, the doctrine was thoroughly considered and the cases elaborately reviewed by Mr. Justice Miller, who delivered the opinion of the Court. When a suit may be conducted alone against the party in possession, as is the rule in ejectment, the person under whom the defendant claims is not a necessary party. The judgment in this case will not conclude or estop the United States, for the reason that it is not a party, and cannot be made a party without its consent.

Carr vs. United States, 98 U. S., 433.

"In United States vs. Lee, the Court said in regard to the effect of the judgment in that case:

"'Another consideration is, that since the United States cannot be made a defendant to a suit concerning

its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this Court in the case of Carr vs. United States, already referred to, the Government is always at liberty notwithstanding any such judgment, to avail itself of all of the remedies which the law allows to every person natural or artificial for the vindication or assertion of its rights. Hence taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined, or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution' (106 U. S., 222). That decision upon its reasoning was sound and meets the approval of this court. The constitutional provision that 'no person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation,' finds its strongest safeguard and most efficient vindication in the doctrine so ably presented by the learned judge who spoke for the majority of the Court in that case. The attention of the Court has been called to the late decisions of the same court in the cases of Stanley vs. Schwalby, 147 U. S., 508, and Hill vs. United States, Supreme Court Reporter, vol. 13, No. 28, decided May 15, 1893.

"In the first of these cases, Stanley vs. Schwalby, the suit was an action of trespass to try title. The property involved was the military post at San Antonio, Texas. The defendants were Gen. Stanley and other officers of the United States. The suit, though it involved the title and possession of the United States to one of its military posts, was maintained. The reporter's head-note to the opinion is somewhat misleading in so far as he states that 'for purposes of jurisdiction there is no distinction between suits against the Government directly, and suits against its property.' The jurisdiction would not exist unless permitted by Congress, where it was directly against the Government, while, as decided in that case, if the suit be against one in possession, and he claims under the Government, the jurisdiction does exist. In that very case the court said in regard to the latter class of cases that, 'In these cases he is not sued as an officer of the Government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense he must show that his authority was sufficient in law to protect him.' In this class is included United States vs. Lee, 106 U. S., 196, where the action of ejectment was held to be in its essential character an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment, and the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this Court held to be lawful, and therefore is insufficient as a defense. 'The statutes of limitation were held applicable,' upon the express ground that 'as an action could have been brought at any time after adverse possession was taken, against the agents of the Government through whom that was done, and by whom it was retained, the objection cannot be raised against

them that the statute could not run because of inability to sue.' (147 U. S., 519.)

"The case of Hill vs. United States has no application. The action was directly against the United States for a tort and was sought to be sustained under the act of March 3, 1887, C., 359, by which Congress provided that the United States might be sued either in the Court of Claims or in the Circuit Court of the United States in cases not sounding in tort. The case is in accord with United States vs. Jones, 131 U. S., 1; Langford vs. U. S., 101 U. S., 341, and U. S. vs. Great Falls Mfg. Co., 112 U. S., 645, and *id.*, 124 U. S., 581."

The case of Tindal vs. Wesley, 17 Sup. Ct., 770, decided by this Court May 10, 1897, reviews the cases on this point at some length and holds that where one attempts to justify his possession under the authority of the government he must show that the right of the government is paramount, or judgment will go against him.

The grant of the upland to the plaintiff in this suit, carried with it the fee of the submerged land abutting thereon; and this is so, notwithstanding the fact that the grant from the United States is confined to the meander line of the stream.

The United States never acquired title to the beds of navigable waters and consequently it was not within the power of that government to grant title to them. In Barney vs. Keokuk, 94 U. S., 324, 328, this Court, speaking of the proprietorship of the beds and shores of navigable waters, said: "It properly belongs to the States by their inherent sovereignty, and the United States has wisely

abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

The case of Pollard vs. Hagan, 3 How., 219, 1845, decided, (1) that the shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the States respectively; (2) that the new States have the same rights, sovereignty and jurisdiction over this subject as the original States; (3) that the ordinance of 1787 providing for the government of the Northwest Territory, that all navigable rivers should remain forever public highways, did not confer upon the Federal Government any power or right to dispose of the land in the bed of the stream, or lessen the title or control thereof by the respective States.

The limitation in the grant from the United States of the land in question, to the meander line, is of no significance, but finds its explanation in the fact that the Federal Government had no authority to grant anything further. The title to the submerged lands in question is in the State of Michigan unless the latter chooses to relinquish its title therein to the owner of the upland. Under the Michigan decisions there can be no doubt that the riparian proprietor owns the bed of the stream subject to qualifications of which we shall speak presently. In Pere Marquette Boom Company vs. Adams, 44 Mich., 405, Mr. Justice Cooley uses the following language: "It has been repeatedly decided in this State that private ownership of lands bounded on navigable fresh water is not restricted to the meander line. (Lormon vs. Benson, 8 Mich., 18; Bay City Gas Light Company vs. Industrial Works, 28 Mich., 182; Maxwell vs. Bay City Bridge Company, 41 Mich., 453.) If it were held that the owner of the bank did not own also the land within the meander line, it would belong not to the United States, but the State (Pollard vs. Hagan, 3 Howard, 219), and it is notorious

that the State never questions the right of the owner to the shore, but concedes it."

In Webber vs. Pere Marquette Boom Co., 62 Mich., 626, it was held that where the United States granted lands bordering on navigable water, and subsequently granted certain shoal land covered by shallow water in front and within the riparian boundaries of the first grant, the second grant was void.

The laws of the State govern in determining riparian rights on a navigable river, although the property is held under a grant from the United States. Webb vs. Demopolis, 95 Ala., 116; Scranton vs. Wheeler, 6 C. C. A., 585.

These cases are sufficient to show that as between the United States and the State of Michigan the title to the submerged lands in question is not in the United States.

The ownership of the upland in Michigan carries with it the title to the submerged land abutting upon the same, comprehended within parallel lines extended perpendicular to the general trend of the shore along his land to the thread of the stream.

Ryan vs. Brown, 18 Mich., 207.
Lorman vs. Benson, 8 Mich., 18.
Rice vs. Rudtiman, 10 Mich., 125.
Pere Marquette Boom Co. vs. Adams, 44 Mich., 403.
Bay City Gas Light Co. vs. Industrial Works, 28 Mich., 182.
Maxwell vs. Bay City Bridge Co., 41 Mich., 453.
Webber vs. Pere Marquette Boom Co., 62 Mich., 626.
Clute vs. Fisher, 65 Mich., 48.
Bigelow vs. Shaw, 65 Mich., 341.
Watson vs. Peters, 26 Mich., 508.

The title to the bed of the stream is therefore in the State, or in the owner of the upland, and as was said in Barney vs. Keokuk, 94 U. S., 324; St. Louis vs. Meyers, 113

U. S., 566, and Pere Marquette Boom Co. vs. Adams, 44 Mich., 405, where a State concedes the title to be in the riparian proprietor by virtue of his ownership of the upland, neither the United States nor any person can question it.

Although the plaintiff in error unquestionably owns the submerged land abutting his property, still the United States has an equally unquestioned right to occupy that land provided it does so for a lawful purpose and in a lawful manner. As soon, however, as its officers exceed the limits of their power and infringe upon the rights of the riparian owner, they are, as to him, trespassers. It being granted that the erection of the pier cutting off plaintiff's right of access, is wrongful as against plaintiff in error, then the defendant is a trespasser upon plaintiff's land and he can be evicted.

The action of ejectment is the proper remedy in this case. The defendant claims the right to maintain the pier in question across the entire riparian front. The plaintiff claims title to only an undivided one-half of the premises. Under the well-settled law the plaintiff would as against this defendant who is a mere intruder and trespasser, be entitled to a judgment ousting them from the possession of the entire tract. There is a difference between the rights of tenants in common and of joint tenants in an action between themselves, and rights of the parties and the form of the judgment where one is a tenant in common and the other a mere trespasser.

The distinction is very well marked and the principles underlying it enunciated in the following decisions:

Freeman on Co. Tenancy, secs. 343-344.
Telfener vs. Dillard, 70 Tex., 139.
Wheeling P. & B. R. R. Co. vs. Maxwell, 122 Pa. St., 613.
Sewers vs. Peterson, 59 Tex., 217.
Pilcher vs. Kirk, 60 Tex., 162.

Contrevas vs. Haynes, 61 Tex., 103.
Harber vs. Dyches (Tex.), Oct. 28, 1890.
Smith vs. Smith, 80 Cal., 324.
Mahoney vs. Van Winkle, 21 Cal., 583.
Hart vs. Robertson, 21 Cal., 349.
Touchard vs. Crow, 20 Cal., 162.
Weise vs. Baker, 7 Col., 180.
Jancey vs. Greenlee, 90 N. C., 319.
Logan vs. Goodell, 42 Ga., 118.
Hardy vs. Wallace, 1 Wall., 371.
Allen vs. Gilson, 4 Rand (Va.), 468.
4 Nev., 416.
Voss vs. King, 33 W. Va., 236.
Carley vs. Paxton, 75 Tex., 98.
Bounds vs. Little, 75 Tex., 316.
Moody vs. Johnson, 17 S. E., 579 (N. C.).

Angell on Watercourses, Secs. 8-9, says, in discussing the question of a right to a water course, that it is a part of the freehold, of which no man can be disseized but by lawful judgment of his peers, or by due process of law.

"Still, no action will lie to recover possession of a water-course by that name * * * the action must be for the *land* at the bottom, calling it "twenty acres of land covered by water."

2 Black Comm., 18.
Remington on Eject., 131.

It has been definitely settled by the Supreme Court of Michigan that ejectment is the proper remedy for the recovery in cases like the one at bar.

Cole vs. Wells, 49 Mich., 450.
Beidellman vs. Folk, 5 Watt., 308.
Lawe vs. Kaukaua, 70 Wis., 306.
Nichols vs. Howland, 52 Hun., 287.
Gould on Waters, Secs. 185, 194 and 471.

For further discussion of right of ejectment see notes Secs. 8 and 9; Angell on Watercourses.

It should not be lost sight of, that plaintiff in error does not complain of nor ask redress for the mere occupation of the bed of the stream, but for the destruction of his right access. Had the latter been left no action could have been maintained. It would have been an easy matter for the United States Government to have provided an opening in the south pier for the ingress and egress of the plaintiff in error to and from his land. Upon its failure to do so, all that remained was to unload his cargo across the pier in question. If, however, the Government deemed it inadvisable to do the one thing or to permit the plaintiff in error to do the other, but considered it necessary to cut off his access altogether and close him in, then it must pay him for the property thus taken.

Independent of all authorities, we consider that this is the only conclusion which can be sustained on principle or commends itself to the ideas of natural justice.

It is submitted that the judgment should be reversed.

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